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IN THE

Supreme Court of the United States

OCTOBER TERM, 1973

No.

NORMAN NEW RIDER, a minor, by his mother and next friend, WILMA WILLIAMS; LLOYD CUMMINGS, JR., a minor, by his parents and next friends, LLOYD and LILLIE CUMMINGS; KENNETH SMITH, a minor, by his mother and next friend, VELMA SMITH, *Petitioners,*

v.

BOARD OF EDUCATION OF INDEPENDENT SCHOOL DISTRICT No. 1, Pawnee County, Oklahoma, whose members are ALBERT ALLEY, President, H. L. RATLIFF, FRANK MALTSBERGER, DONALD WATERS, R. L. WOODARD; H. L. HOLLOWAY as Superintendent of Pawnee School District; JAMES CHILDERS, as Principal of Pawnee Union High School, *Respondents.*

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

Petitioners Norman New Rider, a minor, by his mother and next friend, Wilma Williams; Lloyd Cummings, Jr., a minor, by his parents and next friends, Lloyd and Lillie Cummings; and Kenneth Smith, a minor, by his mother and next friend, Velma Smith,

respectfully pray that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Tenth Circuit entered in these proceedings on May 25, 1973.

OPINIONS BELOW

The opinion of the Court of Appeals, entered on May 25, 1973, is not yet reported. The opinion of the District Court for the Northern District of Oklahoma entered on August 11, 1972 is unreported. Both opinions are included in the Appendix.

JURISDICTION

The judgment of the Court of Appeals for the Tenth Circuit was entered on May 25, 1973.[1] A timely petition for rehearing en banc was denied on June 20, 1973. On July 6, 1973, the Court of Appeals stayed the mandate in these proceedings for a period of 60 days from that date, and the Court of Appeals also ordered that the injunction pending appeal previously granted to petitioners be continued in force and effect for 60 days from that date. This Court's jurisdiction is invoked under 28 U.S.C. § 1254(1).

QUESTIONS PRESENTED

1. Does a school hair length regulation, which prohibits male students from wearing their hair long and in braids, unconstitutionally infringe upon the freedom of expression of male Pawnee Indian students, when male Pawnees have traditionally worn their hair in braids and when the students wish to wear their hair

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[1] The following parties supported the position of the petitioners as amicus curiae: the United States of America; Ute Indian Tribe of the Uintah and Ouray Reservation; Oklahoma Indian Rights Association; and the Colorado Civil Rights Commission.

in braids as an expression of pride in and identity with their racial-cultural heritage?

2. Does a school hair length regulation, which prohibits students from wearing their hair long and in braids, unconstitutionally deny male Pawnee Indian students the equal protection of the laws on the basis of race and culture, when long braided hair has a meaning to Pawnee Indians which is deeply rooted in and totally integrated with the Pawnee Indian culture, and when long braided hair has been the longstanding traditional hairstyle of male Pawnees?

3. Does a school hair length regulation, which prohibits students from wearing their hair long and in braids, unconstitutionally infringe upon the free exercise of religion by male Pawnee Indian students, when the wearing of long hair in braids is an important and integral part of Pawnee religion, when the students wish to wear their hair long and in braids for the specific purpose of adhering to tribal traditions, and when the students are members of a tribal religious dance group in which wearing hair in traditional fashion is an important part of membership?

CONSTITUTIONAL PROVISIONS AND REGULATIONS INVOLVED

The pertinent texts of the following provisions are set forth in the Appendix:

United States Constitution, Amendment I

United States Constitution, Amendment XIV

Pawnee School District Dress Code,
Hair Regulation

Pawnee School District Dress Code,
Indian Exception to Hair Regulation

STATEMENT OF THE CASE

Petitioners are three minor male Indian students who are members of the Pawnee Tribe. Respondents are the various members of the school board, the Superintendent of Schools, and the Pawnee Junior High School principal.

On April 24, 1972, petitioners were indefinitely suspended from Pawnee Junior High School, where they were enrolled as seventh grade students, for wearing their hair longer than permitted by the school dress code (I:3, 56).[2] At the time of the suspension, petitioners were in the process of letting their hair grow long enough to braid (I:54). The trial court denied petitioners' requested injunctive relief on August 10, 1972 (I:84-88). Petitioners appealed that decision to the Court of Appeals for the Tenth Circuit, which affirmed the decision of the trial court in an opinion entered on May 25, 1973. *See* Appendix F.

Throughout all proceedings in this case, petitioners have asserted jurisdiction under 28 U.S.C. § 1343(3) and (4) and 28 U.S.C. § 1331. The injunctive relief sought is predicated upon petitioners' constitutional rights under the first and fourteenth amendments and 42 U.S.C. § 1983. In particular, petitioners assert that their constitutional guarantees of freedom of expression, free exercise of religion, and equal protection of the laws have been abridged by respondents without justification.

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[2] Reference to pages in Record on Appeal to the Tenth Circuit Court of Appeals are abbreviated as follows: (the volume number: the page number), *e.g.*, (I:3, 56) represents Volume I of the Record on Appeal at pages 3 and 56.

Petitioners base their constitutional arguments upon the following facts as established by undisputed evidence in the record.

Long braided hair is a long-standing custom and tradition among the Pawnee Tribe which has racial and cultural significance, particularly in relation to specific tribal dances. *See* Appendix F at 9a. It is symbolic of American Indian cultures and of the Pawnee culture (II:20). Long braided hair has "a much deeper and more specific meaning to American Indian people, to the Pawnee people than it does to non-Indian people" (II:20).

Unlike Judeo-Christian religions, the core of Pawnee theology is the belief that every act must accord with the prescribed order in the universe (II:16-17). *See also* Appendix F at 9a. Hairstyle is of "special importance" in the order (II:17-18). From the viewpoint of Pawnee theology, long braided hair has religious significance because it is a recognized part of the order of life. Indeed, religious dances of the Pawnee require long braided hair. *See* Appendix F at 9a. The petitioners are members of a religious society, in which the traditional hairstyle is an important element (II:115-116). In short, Pawnee religion is highly integrated with most tribal practices and traditions, including hairstyle. *See* Appendix F at 9a, 12a.

Petitioners recognize that most older Pawnees no longer wear their hair in traditional fashion. The record shows that this is due to a now-abandoned policy of the federal government. From about 1860 until approximately 1934, the government affirmatively sought to suppress the traditional tribal ways and to

assimilate American Indians into the general society (II:18-19, 100). Since Indian children were sent to federal boarding schools during most of that period, the policy of suppression was most intensely applied in those schools (II:18-19, 99-100). These sustained attempts to force American Indians to forego their American Indian identity had serious adverse emotional and psychological effects on Indians, especially Indian men (II:19, 63-64, 100).[3]

Federal policy has changed so that individual Indians are now encouraged to practice their customs and traditions, and Indian tribes are encouraged to exercise self-determination: accordingly, the last twenty years have brought a renaissance or rebirth of Indian cultures, including that of the Pawnee (II:20, 65, 100-101). Notwithstanding the period of assimilation, the Pawnee culture and theology has been passed on to the present generation of Pawnees (II:20-21, 65).

Petitioners testified at trial that they wished to wear their hair in braids because of their pride in being Pawnee Indians. *See* Appendix F at 9a. Petitioners also testified that they wished to wear their hair in braids because they wished to adhere to the customs and traditional beliefs of the Pawnee culture (II:49-50, 52-53, 54-56). This testimony was undisputed and petitioners' sincerity was never questioned.

Respondents themselves admitted that a temporary exception to the hair regulation, which permitted male

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[3] One of the boarding school methods of suppressing the customs of American Indian tribes, including the Pawnee, was to cut off the hair of male Indian students. This practice resulted in traumatic experiences for Indian boys (II:18-20, 63-64, 100).

Indians to wear braids, was adopted by them in recognition of Indian tradition (II:82; III:10). The respondents offered very general justifications for the hair length regulation.[4] Respondents admitted that petitioners' traditional hairstyle has never caused any disruption in the school (II:78, 83-84, 91; III:13, 14; I:55).[5]

REASONS FOR ALLOWING THE WRIT

I. This Case Squarely Presents the Court With an Opportunity To Establish a Definition of "Symbolic Speech."

The constitutional protection afforded free expression extends beyond the spoken and written word to communicative conduct, or "symbolic speech." *See Tinker* v. *Des Moines Community School District,* 393 U.S. 503 (1969).[6] We recognize that, under carefully prescribed circumstances, governmental regulation of "symbolic speech" is permissible. *See United States* v. *O'Brien,* 391 U.S. 367 at 376-377 (1968).

There is, however, a crucial threshold question in this area of first amendment protections. The Court has not yet defined "symbolic speech":

> The Court has, as yet, not established a test for determining at what point conduct becomes so

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[4] Respondents stated that such a regulation provides school spirit, pride, initiative and maturity for the student in the classroom. *See* Appendix F at 11a, 12a, 14a.

[5] Pending the appeal to the Court of Appeals, respondents were enjoined from applying the hair regulations to petitioners. Respondents never moved to vacate that injunction on grounds of changed circumstances.

[6] *See also United States* v. *O'Brien,* 391 U.S. 367 (1968); *West Virginia State Board of Education* v. *Barnette,* 319 U.S. 624 (1943); and *Stromberg* v. *California,* 283 U.S. 359 (1931).

> **intertwined with expression that it becomes necessary to weigh the State's interest in proscribing conduct against the constitutionally protected interest in freedom of expression. [*Cowgill* v. *California,* 396 U.S. 371 (1970), Harlan, J., concurring.]**

This case is a perfect vehicle to define "symbolic speech." As will be seen, the lack of such a definition has left lower courts without sufficient guidelines to proceed in this important first amendment area.

The lack of any established criteria for identifying "symbolic speech" has had a varied effect in the lower federal and state courts. Some courts have failed or refused to analyze the problem and instead have summarily dismissed first amendment claims by reference to this Court's statement in *O'Brien* that not all conduct "can be labeled 'speech' whenever the person engaging in the conduct intends thereby to express an idea."[7] Other courts have attempted to establish such criteria, but have reached differing conclusions.[8] The result has been extreme inconsistency in the constitutional protection afforded persons who assert that their conduct was in fact "symbolic speech." The magni-

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[7] *See, e.g., Freeman* v. *Flake,* 448 F.2d 258, 260 (10th Cir. 1971), *cert. denied,* 405 U.S. 1032 (1972); *Richards* v. *Thurston,* 424 F.2d 1281, 1283 (1st Cir. 1970); *United States* v. *Ferguson,* 302 F.Supp. 1111, 1113 (N.D. Cal. 1969); and *Scott* v. *Alabama State Board of Education,* 300 F.Supp. 163, 167 (M.D. Ala. 1969).

[8] *Compare, e.g., Paladino* v. *City of Omaha,* 335 F.Supp. 897 (D. Neb. 1972); *Crosson* v. *Silver,* 319 F.Supp. 1084, 1086-1087 (D. Ariz. 1970); and *Jeffers* v. *Yuba City Unified School District,* 319 F.Supp. 368, 371-372 (E.D. Cal. 1970). *See also* the cases cited in the following footnote.

tude of the problem raised here can be seen from the wide variety of recent cases in which the "symbolic speech" issue has been raised.[9]

The Court can resolve the ambiguity by adopting the following two-part test for determining whether conduct is entitled to first amendment protection as "symbolic speech": (1) did the individual intend his conduct to have communicative value; and (2) was the conduct understood by others as communicating the intended idea.[10] The second criterion recognizes the suggestion in *O'Brien* that a mere intent to communicate is not enough. It establishes the further requirement that there be a "recognizable communicative aspect" in the conduct as suggested by Mr. Justice Harlan in *Cowgill* v. *California, supra,* 396 U.S. at 371,[11] and thus gives added guidance to the

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[9] *See, e.g.*, the flag desecration cases, *Goguen* v. *Smith,* 471 F.2d 88, 96-102 (1st Cir. 1972), probable jurisdiction noted, 41 U.S.L.W. 3613, May 22, 1973, and *State* v. *Spence,* 81 Wash.2d 788, 506 P.2d 293, 299-300 (1973); cases involving nude dancing and nudity in theatrical performances, *Southeastern Promotions, Inc.* v. *Conrad,* 341 F.Supp. 465, 474-477 (E.D. Tenn. 1972), and *Paladino* v. *City of Omaha, supra;* cases involving the refusal to pay taxes, *Non-Resident Tax Ass'n.* v. *Municipality of Philadelphia,* 341 F.Supp. 1139, 1145-1147 (D. N.J. 1972), *aff'd,* 406 U.S. 951 (1972); and the "long hair" cases, *Freeman* v. *Flake, supra,* 448 F.2d at 260, and *Richards* v. *Thurston, supra,* 424 F.2d at 1283.

[10] Such a test has been urged by several authorities. *See generally Note, Symbolic Conduct,* 68 COLUM. L. REV. 1091 (1968); and L. Henkin, *The Supreme Court 1967 Term:* On Drawing *Lines* 82 HARV. L. REV. 63, 79-80 (1968). *See Goguen* v. *Smith, supra,* 471 F.2d at 99; and *Crosson* v. *Silver, supra,* 319 F.Supp. at 1086-1087.

[11] *See also California* v. *LaRue,* — U.S. —, 34 L.Ed.2d 342, 351 (1972); and *United States* v. *O'Brien, supra,* 391 U.S. at 376.

courts in their task of separating true symbolic conduct from non-assertive conduct.[12]

The lack of objective standards for defining "symbolic speech" was at the heart of the erroneous ruling below. Left without a test with which to proceed, the Tenth Circuit simply concluded that the traditional hairstyle was "not akin to pure speech." *See* Appendix F at 13a. If the courts below had followed the test suggested above, their conclusions would have been both easy and different. First, the plaintiffs clearly intended their conduct to have communicative value: their uncontradicted testimony was that they wanted to follow the "old traditional ways" and that their hairstyle was "one way of telling people that I am proud [to be an Indian]" (II:52). Similarly, the record is clear on the second aspect of the test, that the conduct was understood by others as communicating the intended idea: the respondent school board itself at one time established an exception to the dress code, permitting Indian boys to wear their hair long and in braids in recognition of American Indian tradition (II:82; III:10).[13]

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[12] *See* Note, *Constitutional Law—High School Authorities and the Long Haired Students: In Quest of an Appropriate Analytical Framework*, 47 TUL. L. REV. 407, 410-411 (1973.

[13] *See also* II:20, 66. The wearing of long braided hair by Indians has been recognized as "a time-honored means of expressing their racial heritage and identity" and, therefore, has received first amendment protection by at least one federal court. *Duro* v. *Valley Center Union School District*, Civil No. 72-224-S (S.D. Cal. 1972). *See also Braxton* v. *Board of Public Instruction of Duval Co., Fla.*, 303 F.Supp. 958 (M.D. Fla. 1969), where a black's wearing of a goatee as "an appropriate expression of his heritage, culture and racial pride" was afforded first amendment protection.

Thus, a simple, objective test for defining "symbolic speech" would have accorded these petitioners the first amendment protection to which they are entitled. The formation of such a test would provide lower federal and state courts with needed guidelines for dealing with the important constitutional area of "symbolic speech."

II. The Facts of This Case Permit This Court To Determine, for the First Time, the Extent to Which the Equal Protection Clause Guarantees to American Indians the Right To Retain Their Cultural and Racial Uniqueness.

The classification established by the hair length regulation at issue here includes all male students in the Pawnee school system. The class affected by the statute, however, is not uniform. The class includes a separately recognizable, well-defined class of persons: male Pawnee Indian students, who abide by a unique racial, cultural and religious practice of wearing long braided hair and who are therefore not similarly situated to other, non-Indian members of the general class established by the regulation.[14]

The inclusion of male Pawnee Indian students within the broad class established by the regulation forces such students to carry a far heavier burden than other, non-Indian members of the class. In particular, petitioners carry the grave burden of choosing between their racial identity, cultural prac-

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[14] The record in this case establishes that the wearing of long braided hair has a "much deeper and more specific meaning" to Pawnee Indians than to non-Indians (II:20); that hair style is inextricably tied to Pawnee Indian racial, cultural and religious practices (II:16-17); and that long braided hair is "symbolic of the American Indian culture and . . . of the Pawnee culture" (II:20).

tices and religious beliefs on the one hand, and their desire and need for an education on the other.

A denial of equal protection has often been found by this Court even where, as here, the state action is even-handed on its face; the rationale is that like treatment of persons not similarly situated can place an unequal burden on some identifiable groups within the classification. *See, e.g., Griggs* v. *Duke Power Co.*, 401 U.S. 424 (1971); *Harper* v. *Virginia Board of Elections*, 383 U.S. 663 (1966); and *Griffin* v. *Illinois*, 351 U.S. 12 (1956).[15]

Since the discrimination in this case is based upon race, the regulation must be subjected to "the most rigid scrutiny." *Korematsu* v. *United States*, 323 U.S. 214, 216 (1944). *See also, e.g., Bolling* v. *Sharpe*, 347 U.S. 497, 499 (1954); and *McLaughlin* v. *Florida*, 379 U.S. 184, 194 (1964). The respondents, therefore, should have been required to justify the regulation by a compelling state interest. *See, e.g., Griggs* v. *Duke Power Co., supra; McLaughlin* v. *Florida, supra;* and *Loving* v. *Virginia*, 388 U.S. 1 (1967).

The classification established by the regulation, insofar as it includes the distinct and unique class of male Pawnee Indian students, is unsupported by any compelling state interest.

The Court of Appeals defined respondents' justification for the regulation as "that of instilling pride

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[15] The constitutional impropriety in such "over-inclusive" classifications has been discussed in detail in the excellent Note, *Developments in the Law: Equal Protection*, 82 HARV. L. REV. 1065, 1086-87 (1969). This Court has cited the article with approval. *See Dandridge* v. *Williams*, 387 U.S. 471, 486 (1970).

and initiative among the students lending to scholarship attainment and high school spirit and morale." *See* Appendix F at 14a. It is apparent, both from the testimony in the record and from the historic Indian experience in American school systems, that respondents failed not only to satisfy the strict scrutiny standard of review, but they failed to establish even a rational relationship between the classification established by the regulation and the stated purpose of the classification, insofar as it applies to petitioners as Pawnees and American Indians.

The petitioners testified that they wished to wear their hair long and in braids in order to follow the tradtional Pawnee ways and to express their pride in being Indian (II:49-50, 52-53, 54-56). In light of this testimony, it is wholly without rational basis to conclude that the application of the school hair length regulation to petitioners could possibly instill in them "pride and initiative . . . lending to scholarship attainment and high school spirit and morale."

Secondly, history has shown that school policies which force Indians to abandon their traditional racial and cultural practices lead to negative educational results. For almost a century, the federal government followed a policy aimed at suppressing Indian traditions and assimilating Indians into the great American "melting pot." [16] An integral part of

[16] In 1969, the Senate subcommittee on Indian education aptly described the effect of this policy on the federal school system for Indians:

> The Bureau of Indian Affairs had started building its boarding schools system in the 1870's, often using abandoned Army posts or barracks as sites. Such schools were run in rigid military fashion, with heavy emphasis on rustic vocational

the "assimilation" policy was to cut off the hair of male Indian students in federal boarding schools. One Indian witness, 64 years of age, described this experience:

> "[W]hen I was a boy, a little fellow, I had long hair . . . [W]hen I went to school [my family] braided my hair . . . When I got to school there, they cut my hair, they cut my hair. They didn't have no clippers them days and just used scissors, put marks all over my head, cut my hair off; and I ran off, went home. My folks didn't know me. I mean, the whole family cried, old folks. All had long hair. That's what they wore." [II:63-64.]

The tragic results of the federal policy are documented in the dismal statistics attesting the low educational achievement of Indian children.[17] The

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education. They were designed to separate a child from his reservation and family, strip him of his tribal lore and mores, force the complete abandonment of his native language, and prepare him for never again returniing to his people. [SPECIAL SUBCOMMITTEE ON INDIAN EDUCATION OF THE SENATE COMMITTEE ON LABOR AND PUBLIC WELFARE, INDIAN EDUCATION: A NATIONAL TRAGEDY—A NATIONAL CHALLENGE, S.REP.No. 91-501, 91st Cong., 1st Sess. 12 (1969) (hereinafter cited as S.Rep.No. 501).]

[17] The extensive record of the Senate Subcommittee on Indian education seven volumes of hearings, five committee prints, and S. REP.NO. 501, constitute a major indictment of the failure to provide an effective, quality education for Indian children:

> Drop-out rates are twice the national average in both public and Federal schools. Some school districts have dropout rates approaching 100 percent;
>
> Achievement levels of Indian children are 2 to 3 years below those of white students; and the Indian child falls progressively further behind the longer he stays in school;
>
> Only 1 percent of Indian children in elementary school have Indian teachers or principals;

policy was finally repudiated only recently. However, public schools are faring no better than federal boarding schools in educating the American Indian child:

> Study after study shows Indian children growing up with attitudes and feelings of alienation, hopelessness, powerlessness, rejection, depression, anxiety, estrangement, and frustration. Few studies . . . show the public schools doing anything to change this pattern. The public school becomes a place to leave when he becomes 15 or 16. . . . [T]he Indian child comes to believe "he can only succeed if he were white." [S. REP. No. 501 at 28.]

In sum, historical experience and educational studies support the conclusion that stripped of his traditional customs, the Indian child is in fact stripped of his pride, his initiative, his identity. As stated by Dr. Karl Menninger:

> "Someone has committed a crime in making the Indian feel ashamed of his own heritage. You cannot crush a child's spirit and then expect him

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One fourth of elementary and secondary school teachers—*by their own admission*—would prefer not to teach Indian children; and

Indian children, more than any other minority group, believe themselves to be "below average" in intelligence.

What are the consequences of our educational failure? What happens to an Indian child who is forced to abandon his own pride and future and confront a society in which he has been offered neither a place nor a hope? Our failure to provide an effective education for the American Indian has condemned him to a life of poverty and despair." [S.REPT. No. 501 at IX-X (emphasis in original).]

> to rise up with initiative, pride, and imagination . . . It often seems that Indian children are being deprived of a sense of their own identity." [A. SMITH, INDIAN EDUCATION IN NEW MEXICO 38 (Publications of the Division of Government Research, The Institute for Social Research and Development, The University of New Mexico, No. 77, 1968.)]

Petitioners urge upon this Court a decision which would constitute a judicial milestone long awaited by American Indians who must attend the public schools of this country: that the equal protection clause is applicable to protect the cultural and racial uniqueness of American Indians, and that the state cannot presume irrebutably that a regulation justified as to general application applies equal burdens to Indians and non-Indians alike.

III. This Case Raises for the First Time the Question of the Extent To Which the First Amendment Protects Exercises of a Traditional American Indian Religion.

Based upon their adherence to the beliefs and practices of the traditional Pawnee tribal religion, petitioners assert that their wearing of long braided hair is a religious exercise within the meaning of the first amendment.[18]

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[18] Because the religious beliefs and the daily life of Pawnees are highly integrated, the idea of separateness between the sacred and the secular, as communicated by the word "religion," is not meaningful in the Pawnee culture. Therefore, petitioners' testimony that they wish to wear long hair because they wish to follow the old traditions of the Pawnee, and because they wish to dance the traditional dances indicates the religious significance of long hair in braids in terms which are meaningful to a Pawnee child, given the nature of Pawnee religious beliefs. *See, e.g.*, II:16-18, 49-50, 52, 54-55.

The Court of Appeals properly assumed that the traditional Pawnee religion is a religion under the first amendment.[19] The crucial error of the Court of Appeals was its decision that the wearing of long braided hair is not a religious exercise within the meaning of the first amendment because the Pawnee religion has "no prescribed belief standard" which may be applied to determine whether a particular act is an exercise of that religion within the meaning of the first amendment. *See* Appendix F at 17a.[20] The fear of the Court of Appeals apparently arose from the nature of the Pawnee religion which ascribes to the belief that there is no separation between the sacred and the mundane aspects of life; the propriety of all activities depends upon whether such activities are believed to be in keeping with the harmonic order in the universe. *See* Appendix F at 9a, 12a.

The Court of Appeals understandably did not wish to hold that any and all activities of adherents to the Pawnee religion are constitutionally protected. And

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[19] The facts in the record clearly establish that the traditional Pawnee religion is no less entitled to constitutional status than that of the Amish religion, which is strikingly similar in many aspects to the Pawnee religion. The Pawnee religion like the Amish religion perceives no separation between the sacred and mundane aspects of life; in both religions the religious beliefs pervade and determine the entire way of life; both religions have been in existence for hundreds of years; and both are associated with a cohesive, well-defined group of people. *Compare* Court of Appeals summary of evidence, Appendix F at 9a, and II:16-18 of record on appeal, with *Wisconsin* v. *Yoder*, 406 U.S. 205, 215-218 (1972).

[20] The Court of Appeals found the same constitutional defect to be characteristic of cases concerning religious beliefs of conscientious objectors. *See* Appendix F at 17a.

in perceiving no judicial guidelines to distinguish between those activities of the Pawnee religion which should be entitled to constitutional protection and those which should not, the court simply washed its hands of the question: it held that, where there is "no prescribed belief standard," a court must decline to afford constitutional protection to any practices because to afford protection to one practice would be to mandate, in effect, constitutional protection to all activities of adherents to the tradition. *See* Appendix F at 17a.

Thus, this Court is faced with the unique question of the extent to which the free exercise clause of the first amendment protects practices of a traditional American Indian religion, a religion fundamentally different from the Judeo-Christian religions which the first amendment was designed to protect.

Petitioners suggest that the test which courts should use to determine whether an activity prescribed by the traditional Pawnee religion is entitled to first amendment protection is a balancing of the importance that a particular activity has in the belief structure of the Pawnee religion and the importance of the state's interest in regulating that activity. The importance of a particular practice in a religion based upon oral tradition, as the Pawnee religion, is ascertainable from the testimony of either the Indians themselves or from anthropologists who have studied the way of life of the tribe.

The record in this case abundantly supports the fact that petitioners wear long braided hair because the Pawnee religion places great importance upon that hairstyle as the religiously ordered hairstyle for

Pawnee men[21] (II:16-18; 115-116). If a Pawnee male does not have long braided hair either he is a warrior (II:12) or he is not in accord with the order in the universe and thus threatens to upset all other aspects of that order. Hairstyle, and indeed all aspects of ritual or religious ceremonial dress of the Pawnee, is dictated by the Pawnee's perception of harmonious order in the universe. Long braided hair is the most important part of the ritual Pawnee dress which must be worn to accomplish meaningful ceremonies. *See* Appendix F at 9a; II:18; *see also* II:39.[22]

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[21] The style in which one's hair is worn is of religious importance to other groups. For example, in *Ho Ah Kow* v. *Nunan,* 12 F. Cas. 252 (No. 6, 546) (C.C.D. Cal. 1879), the facts of which are strikingly similar to those in this case, a city ordinance directed that the hair of prisoners be cut to within one inch of the scalp for disciplinary and sanitary reasons. The court held that the ordinance inflicted cruel and unusual punishment on Chinese prisoners because

> it is the custom of Chinamen to shave the hair from the front of the head and to wear the remainder of it braided into a queue; that the deprivation of the queue is regarded by them as a mark of disgrace, and is attended, *according to their religious faith,* with misfortune and suffering after death. [*Ho Ah Kow* v. *Nunan, supra* at 253 (emphasis added).]

Similarly, Orthodox Jews of the Hassidic Sect wear long sidelocks in literal obediance to Leviticus XIX:27 "Ye shall not round the corners of your heads." 13 ENCYCLOPEDIA JUDICA 270 (1971). The Hassidic Jews believe that the whole universe is part of God's garment and that we must appear and behave in a holy manner because no one can discern the moment when the transformation of the secular into the holy actually occurs. 7 ENCYCLOPEDIA JUDICA 1403-1411 (1971). *See also* S. POLL, THE HASSIDIC COMMUNITY OF WILLIAMSBURG (1962).

[22] Three authorities have squarely ruled that the right of Indian students to wear their hair in traditional fashion is protected by the free exercise clause: *Duro* v. *Valley Center Union School District,* Civil No. 72-224-S (S.D. Cal. 1972); *Michigan Civil Rights*

In summary, it appears that the court below declined to afford the wearing of long braided hair by petitioners constitutional protection as a religious exercise on the ground that the Pawnee religion provides no belief standard which can be applied by a court to determine what activities are religious within the meaning of the first amendment. Petitioners urge that the court below erred in indulging in this judicial washing of hands. The first amendment guarantee of religious freedom prohibits states from unjustifiably regulating, penalizing or discriminating against groups because they hold and practice religious beliefs which may be different from those of mass society. *Cantwell* v. *Conn.*, 310 U.S. 296 (1940); *Fowler* v. *Rhode Island*, 345 U.S. 67 (1953); *Sherbert* v. *Verner*, 374 U.S. 398 (1963); *People* v. Woody, 61 Cal.2d 716, 394 P.2d 813 (S.C. Cal. 1964).[23]

Commission v. *Dearborn Heights School District No. 7*, Civil No. 205215-R (Cir. Ct. Mich. 1972); the third authority is the Colorado Civil Rights Commission which, after a hearing, concluded as follows *regarding the Pawnee religion:*

> [T]he religious practice and creed of Indians who are active in the religion of their ancestors require that their hair not be cut. This is so, because of the religion's belief that all parts of a person's body are sacred and should not be disturbed or interfered with.

On appeal, the Colorado District Court, in *School District No. 11-J* v. *Howell*, Civil No. C-879 (Colo. 1972), reversed the Commission on the narrow ground that a student can be excluded from school if he refuses to fill out the school's application form, which is necessary to claim the religious exemption. The court did not reverse the finding of the Commission as set forth above. A certified copy of the district court's opinion was filed with the Court of Appeals which took judicial notice of those proceedings.

[23] Federal administrative control of Indian life, until recently, recognized no right of religious freedom for Indians. "Administrators who identified civilization with a particular sect infringed

Petitioners urge this Court to reverse the decision of the court below which, in a case of first impression, has decreed that practices of a traditional American Indian religion are not protected by the first amendment.

CONCLUSION

Throughout the Court of Appeals' opinion runs its interpretation of this Court's opinion in *Brown* v. *Board of Education,* 347 U.S. 483 (1954), to the following effect:

> that only by amalgamating children of various races, colors, cultural, ethnical and environmental backgrounds can the public schools become the effective "marketplace of ideas" for the benefit of all students. [*See, e.g.,* Appendix F at 15a.]

Whether such an educational policy is termed "amalgamation", assimilation "or promoting civilization among the aborigines," [24] it has been proven time and time again to be wholly ineffective at best, and totally inhuman at worst. Perhaps the attractiveness of this solution lies in the ease with which it can be

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the religious liberty of the Indians and interfered on the ground of immorality, with many of the dances and other cherished customs of some of the tribes." F. COHEN, HANDBOOK OF FEDERAL INDIAN LAW 175 (1942 ed.). "On many reservations, native ceremonies were flatly forbidden, regardless of their harmless nature. *In some cases force was used to make the Indians of a reservation cut their hair short.*" THE NEW DAY FOR THE INDIANS; A SURVEY OF THE WORKING OF THE INDIAN REORGANIZATION ACT OF *1934 at 12* (Nash ed. 1938) (emphasis added).

[24] *See* S.REP. No. 501 at 143.

implemented. But as the Senate Subcommittee stated in its report on Indian education:

> There are no quick and easy solutions in this tragic state of affairs; but clearly effective education lies at the heart of any lasting solution. And that education should no longer be one which assumes that cultural differences mean cultural inferiority. [S. REP. No. 501 at X.]

In addition to closing its eyes to the mass of statistics showing the dismal state of Indian education in this country, the Court of Appeals merely scratched the surface of the complex constitutional issues involved in this case and did not even discuss the pertinent cases relied upon most heavily by petitioners: *see Wisconsin* v. *Yoder,* 406 U.S. 205 (1972); *Tinker* v. *Des Moines Community School District,* 393 U.S. 503 (1969); *People* v. *Woody, supra,* and the equal protection cases cited in Section II, above.

In this day and age of mass conformity, petitioner Pawnee Indians urge this Court to repudiate the "amalgamation" theory adopted by the court below and to reaffirm the basic constitutional principles of freedom so vital to the survival of American Indians as a unique people. Petitioners commend to this Court the reasoning in the great opinion of the California Supreme Court in *People* v. *Woody,* 61 Cal.2d 716, 394 P.2d 813 (1964):

> In a mass society, which presses at every point toward conformity, the protection of a self-expression, however unique, of the individual and the group becomes ever more important. The varying currents of the sub-cultures that flow

> into the mainstream of our national life give it depth and beauty. We preserve a greater value than an ancient tradition when we protect the right of the Indians . . . [394 P.2d at 821-22.]

Accordingly, we respectfully submit that this Court should issue a Writ of Certiorari to review the judgment and opinion of the United States Court of Appeals for the Tenth Circuit.

Respectfully submitted,

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